OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

June 23, 1999

Mr. John Aldridge S. Aldridge
Walsh, Anderson, Brown, Schulze, & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR99-1738

Dear Mr. Aldridge:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125992.

The Calallen Independent School District (the "district") received a request for a complaint filed by a former district employee and information related to his subsequent settlement of the matter with the district and his resignation. You claim that the information responsive to the request is protected under sections 552.101, 552.102, and 552.103 of the Government Code.

Section 552.101 requires withholding information made confidential by constitutional or statutory law or by judicial decision, including information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

Section 552.101 also embraces constitutional privacy protection. *See Industrial Found.*, 540 S.W.2d at 678. The constitutional right to privacy consists of two related interests: 1) the individual interest in independence in making certain kinds of important decisions, and 2) the individual interest in independence in avoiding disclosure of personal matters. The first interest applies to the traditional "zones of privacy" described by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Paul v. Davis*, 424 U.S. 693 (1976). These "zones" include matters related to marriage, procreation, contraception, family relationships, and child rearing and education.

The second interest, in nondisclosure or confidentiality, may be somewhat broader than the first. Unlike the test for common-law privacy, the test for constitutional privacy involves a *balancing* of the individual's privacy interests against the public's need to know information of public concern. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). In our opinion, none of the submitted information is protected by common-law or constitutional privacy in conjunction with section 552.101.

Section 552.102(a) protects

> information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

Section 552.102(a) is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982). *See also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Thus, we do not believe that any of the submitted information is protected under section 552.102 either.

You claim that a portion of the submitted information is made confidential by section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 provides that "[a]ny document evaluating the performance of a teacher or administrator is confidential." *See generally* Open Records Decision No. 643 (1996). Having reviewed your arguments and the information for which you claim the protection of section 21.355, we do not believe that the information at issue can be characterized as "evaluations" within the meaning of section 21.355. None of the information may be withheld on this basis.

You also express concern that the release of the requested information would violate the liberty interests of the former district employee under the Fourteenth Amendment of the

United States Constitution. We note, however, that

> [t]o establish a liberty interest, an employee must demonstrate that his governmental employer has brought *false charges* against him that might seriously damage his standing and associations in his community, or that impose a stigma or other disability that forecloses freedom to take advantage of other employment opportunities. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Wells v. Hico Indep. Sch. Dist., 736 F.2d 243, 256 (5th Cir. 1984) (emphasis added; parallel citations omitted). We do not believe the requested information itself reflects "false charges" by the district as contemplated in the referenced court decisions. Consequently, the release of this information would not implicate the Fourteenth Amendment interests of the individual in question. None of the information may be withheld on this basis.

You also claim that a portion of the requested information must be withheld under the Family Educational Rights and Privacy Act of 1974 ("FERPA"). That act provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain numerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). When a student has attained the age of eighteen years or is attending an institution of postsecondary education, the student holds the rights accorded by Congress to inspect these records. 20 U.S.C. § 1232g(d). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982); 206 (1978). We have marked the kinds of information at issue which we believe must be withheld under FERPA.

Section 552.103(a) of the Government Code excepts from required public disclosure information

> (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You submit as responsive to the request an EEOC complaint. This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 (1983) at 2, 336 (1982). However, you indicate that the dispute reflected in the complaint has been settled. The settlement agreement you submitted as information responsive to the request indicates that he parties have agreed that suit will not be brought pursuant to the complaint and that they will request that that matter be closed. Under the circumstances, we do not believe that the district reasonably anticipates litigation in this matter. Accordingly, none of the information at issue may be withheld under section 552.103.

Finally, we note that a portion of the submitted information may be subject to sections 552.024 and 552.117 of the Government Code. Sections 552.024 and 552.117 provide that a public employee or official can opt to keep private his or her home address, home telephone number, social security number, or information that reveals that the individual has family members. We have marked information which you must withhold if, prior to the time of the request for the information, the employee had elected to keep the information private. Open Records Decision Nos. 530 (1989), 482 (1987), and 455 (1987). Except for the information which we have indicated you must withhold under FERPA, or which may be subject to section 552.117, you must release the requested information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

William Walker
Assistant Attorney General
Open Records Division

WMW/eaf

Ref.: ID# 125992

Encl. Marked documents

cc: Mr. Brent Schrotenboer
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(w/o enclosures)